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No. 317

Supreme Court of the United States

OCTOBER TERM, 1950

OLIVER CLEVE RYLES,
Petitioner,

VERSUS

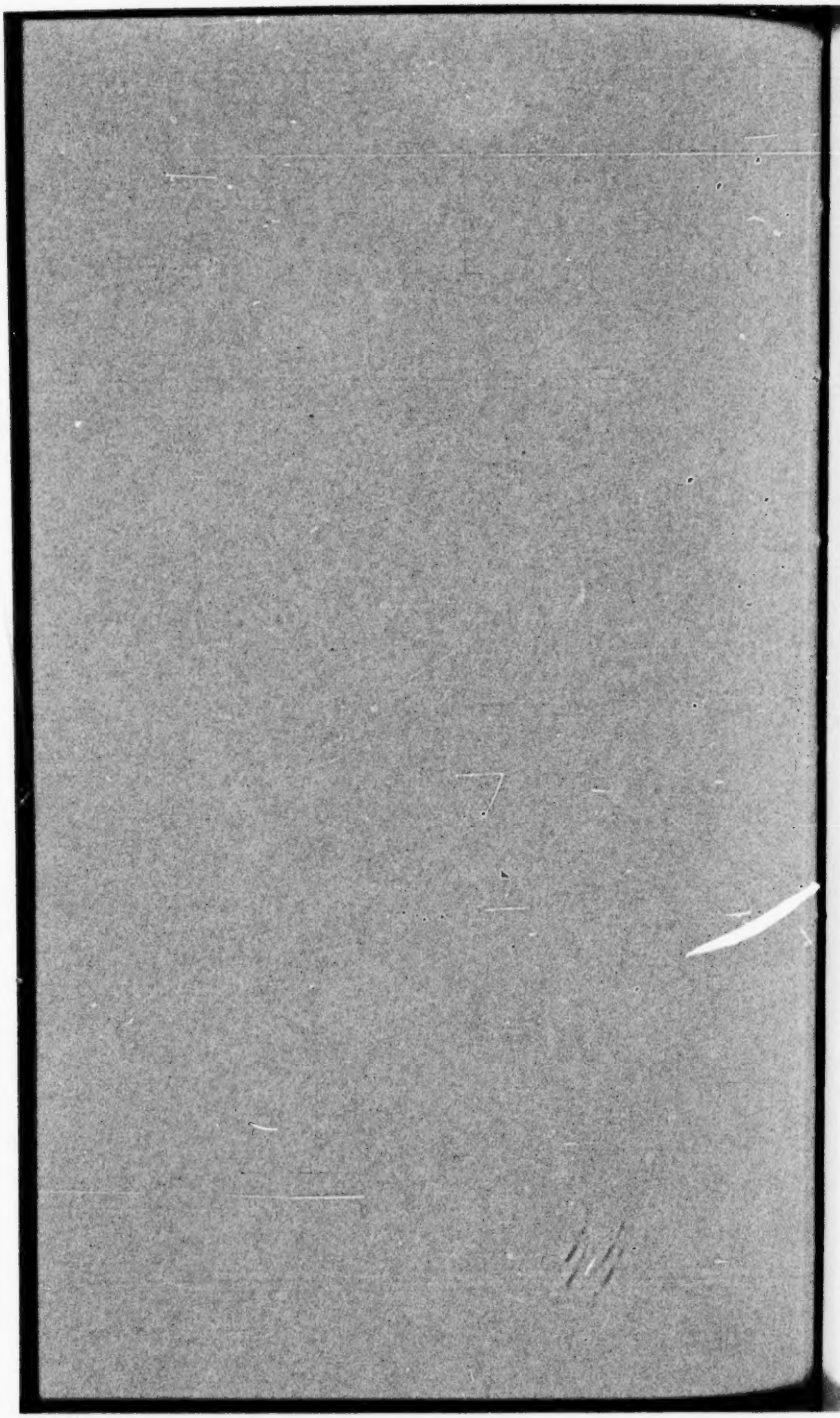
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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AUTHORITIES

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The petitioner, Oliver Cleve Ryles, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, in case Numbered 4069 therein, entitled, "Oliver Cleve Ryles, Appellant v. United States of America, Appellee." The judgment of that court was entered on August 22, 1950.

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported but is copied in the appendix to this petition and is shown in the record.

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OPINION BELOW

The opinion of the Court of Appeals has not yet been reported but is copied in the appendix to this petition and is shown in the record.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1), and Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

A.

Whether in a prosecution for an alleged sale of narcotics in violation of 26 U. S. C., Sec. 2554(a), where evidence introduced on behalf of the defendant (petitioner here) showed that he had been wrongfully entrapped into making the alleged sale, and that the defendant had no previous intention of committing such an offense, and that an agent of the government by persuasion and continued insistence, incited and lured him to commit the act alleged to constitute the offense in order to entrap him, and that the defendant would not have committed such an offense if it had not been for such insistence and persuasion, it was error for the trial court, in instructing the jury, to give controlling importance to the question as to whether defendant had a reputation for selling narcotics and as to whether the officers of the government had reasonable grounds to believe that he was selling narcotics, by an instruction as follows: ("You are * * * instructed that if you find from the evidence and beyond a reasonable doubt that the defendant had a reputation for selling narcotics and that the officers of the government had reasonable grounds to believe that he was engaged in selling narcotics and in good faith sought to obtain evidence of such violations, you should convict the defendant as to each count of

the indictment if you further find beyond a reasonable doubt that he made the sales as charged"), where the alleged sale was made to a hired agent of the officers?

B.

Whether it was error, in such a case, for the trial court to, in effect, instruct the jury that the defense of entrapment was not available to the defendant (petitioner) if the jury found that the defendant had a reputation for selling narcotics and that the officers of the Government had reasonable grounds to believe that he was engaged in selling narcotics, and in good faith sought to obtain evidence of such violations, thus not making the officers responsible for over-persuasion of the defendant by the hired agent of the officers, if the defendant was induced by such persuasion to commit the act alleged to constitute the offense, when he would not otherwise have committed such an offense?

C.

Whether, in such a case, the trial court properly instructed the jury on the issue of entrapment?

D.

Whether, in such a case, the trial court erred in refusing to instruct the jury on the question of entrapment as requested by the defendant (petitioner)?

SUMMARY STATEMENT OF MATTERS INVOLVED

Petitioner was charged by indictment in the United States District Court for the Eastern District of Oklahoma,

in two counts, each attempting to charge a sale of narcotics in violation of Section 2554(a) of Title 26, U. S. C. (R. 1).

The indictment charged in the first count that petitioner sold to one Darrell Herbert Brown 3/16ths of an ounce of deodorized tincture of opium on or about August 18, 1947, for the sum of $7.00, and in the second count, that petitioner sold to Brown on or about August 20, 1947, four one-quarter grain tablets of morphine, a derivative of opium, for the sum of $9.00, and each count alleged that the alleged sale was made "not in pursuance of a written order of the said Darrell Herbert Brown upon a form prescribed and furnished by the Collector of Internal Revenue, and not within any of the exemptions or exceptions provided by law."

Petitioner will be referred to herein and in the brief in support of this petition as the defendant.

The defendant pleaded not guilty to both counts (R. 2).

This is the second time this case has been before this Court. The case has been tried twice.

The first trial resulted in a verdict of guilty of both counts, and a judgment of guilty of both counts, and a sentence of three years imprisonment on each count, to run concurrently. The defendant appealed from that judgment and sentence to the United States Court of Appeals for the Tenth Circuit, and that court rendered an opinion and judgment affirming same (*Ryles* v. *U. S.*, 172 Fed. [2d] 72), but the defendant's petition to this Court for review by *certiorari* was granted, and a new trial was ordered, by a memorandum decision, dated April 18, 1949. (*Ryles* v. *U. S.*, 336 U. S. 949, 69 Sup. Ct. 882, 93 L. Ed. 1104).

The second trial was held at Ada, Oklahoma, on January 9 and 10, 1950 (R. 8), with a jury. The jury returned a verdict finding the defendant not guilty on the first count, but guilty on the second count (R. 2). On January 19, 1950 (R. 4), the court rendered judgment of guilty on the second count, and sentenced the defendant to imprisonment for three years on the second count (R. 4). The defendant appealed from such judgment and sentence to the United States Court of Appeals for the Tenth Circuit, and that court, on August 22, 1950, entered the opinion and judgment affirming same of which it is sought to obtain a review by this petition. The trial court allowed defendant to make bond on appeal in this case (R. 6).

The evidence (R. 9 *et seq.*) showed that the alleged sales were made to an informer, Darrell Herbert Brown, whom the government narcotic bureau officers, H. B. Westover and Theodore Hagstrom, had hired to attempt to purchase narcotics from the defendant; that Brown was an addict, and the narcotic bureau officers arranged for his release on his own recognizance from confinement in the County Jail of Tulsa County, Oklahoma, at Tulsa, Oklahoma, where he was charged with robbery of a doctor of narcotics, and brought him to Ada, Oklahoma, with a woman named Wanda Roumaine, and that Brown was paid $5.00 a day by the government and was a special employee and agent of the government, and was hired by the narcotic bureau officers to attempt to purchase narcotics from the defendant. The defendant's testimony (R. 58) showed that he was not engaged in selling narcotics and had none to sell, and that he had no intention to sell any, and that he had never sold any, and that he was induced

by Brown, by continued begging and insistence by Brown, on each of the alleged occasions, to attempt to procure a small quantity of morphine for Brown and the woman, Wanda Roumaine, whom Brown claimed was his wife; that Brown and such woman claimed to be suffering greatly and in great need of morphine, and the defendant was finally induced by pity for them to attempt to accommodate them, and on each of the two occasions purchased a small quantity of morphine tablets from another addict, with the money furnished by Brown (which had been furnished Brown by the officers), and made nothing out of the transactions. The defendant denied having anything to do with the liquid tincture of opium which was introduced in evidence in support of the first count, although he did admit obtaining a small quantity of morphine tablets for Brown on each of the two alleged occasions. This probably accounts, in view of the court's instructions, for the verdict of not guilty on the first count. To be brief, the petitioner can assert that his evidence, and the inferences to be drawn from all the evidence, strongly tended to prove that the defendant was induced to do the acts alleged to constitute the alleged sale of narcotics for which he was convicted by reason of the continued insistence and persuasion of Brown, the hired agent of the officers, and by reason of the defendant taking pity on Brown and the woman who was with him, and that if it had not been for such persuasion and inducement the defendant never would have committed the alleged offense, or any similar offense; that he had never sold any narcotics in violation of the law.

There was some testimony by the officers that they had received reports that the defendant was selling narcotics, and that he had a reputation for that (R. 46-54).

The defendant had never been convicted of selling narcotics, although he had, in 1944, been convicted in one case in Federal Court of two counts of altering a prescription for morphine, and a count of uttering a falsely altered prescription, and had been sentenced to imprisonment for two years, and had served such sentence (R. 89). The defendant admitted that he was an addict, and stated that he had become addicted to the use of morphine by being treated with it by doctors for illness (R. 58).

Petitioner contends that the instructions of the court were erroneous in making the controlling or determining question in deciding whether defendant had been wrongfully entrapped, the question as to whether the defendant had a reputation for selling narcotics and as to whether the narcotic bureau officers had reasonable cause to believe that he was selling narcotics, thus, in effect, not allowing the defense of entrapment to be available to the defendant if the jury found that the officers had reasonable grounds to believe that the defendant was engaged in selling narcotics, and that the court erred in not instructing the jury as requested by petitioner that if the defendant had not had any intention of committing such an offense but was induced by continued insistence and representations of government agents to do it, in order that he would be entrapped and prosecuted, when he would not otherwise have been guilty of such an offense, that he was wrongfully entrapped, and, in this connection, that Brown was an agent of the government.

Defendant's Requested Instructions

The defendant submitted five requested instructions, each of which was refused, and exceptions were allowed to the refusal of each of them (R. 98).

The defendant's requested instructions were as follows:

"Defendant's Requested Instruction No. 1.

"It is never permissible for the government through its officers and agents to initiate the criminal act, nor to entice or induce a defendant to commit a crime, when, without such enticement, or inducement, the defendant would not have committed such crime. A defendant cannot be convicted of a crime which was provoked or induced by a Government agent or officer and which would not otherwise have been committed (*DiSalvo* v. *U. S.*, 2 F. [2d] 222) Refused—Exceptions Allowed. Eugene Rice, Judge."

"Defendant's Requested Instruction No. 2.

"Within the meaning of these instructions, the witness, Darrell Herbert Brown, was an agent of the government. Refused—Exceptions Allowed. Eugene Rice, Judge."

"Defendant's Requested Instruction No. 3.

"You are instructed that, as to each count of the indictment, that, if prior to the commission of the acts alleged to constitute the offense, the defendant never conceived any intention of committing such offense, or similar offenses, but that the officers or agents of the government incited and by persuasion, or continued insistence and representations, lured him to commit the offense alleged in order to entrap, arrest and prosecute him therefor, then these facts are fatal to the prosecution, and the defendant is entitled to a

verdict of not guilty *(Capuano* v. *U. S.*, 9 F. [2d] 41). Refused—Exceptions Allowed. Eugene Rice, Judge."

"Defendant's Requested Instruction No. 4.

"As to each count of the indictment, you are instructed that if the defendant had no intention of committing a crime, and if an agent of the government urged, persuaded, solicited, or caused him to commit the acts alleged to constitute the offense, that he is not guilty of the alleged offense, and was illegally entrapped *(United States* v. *Liquor,* 290 Fed. 824; *Hunter* v. *U. S.*, 62 F. [2d] 217; *Butts* v. *U. S.*, 273 F. 35, 18 A. L. R. 143; *Newman* v. *U. S.*, 299 Fed. 128; *Wall* v. *U. S.*, 65 F. [2d] 993; *Sorrells* v. *U. S.*, 287 U. S. 435, 86 A. L. R. 249). Refused—Exceptions Allowed. Eugene Rice, Judge."

"Defendant's Requested Instruction No. 5.

"As to each count of the indictment, you are instructed that the defendant has no burden of proof to sustain, as to any issue or defense in this case, including the defense of entrapment, and any evidence in this case tending to show that the defendant was wrongfully entrapped into committing the acts alleged to constitute the offense is to be taken into consideration with all the evidence, and if, when it is taken into consideration with all the evidence, you have a reasonable doubt of the guilt of the defendant, you will resolve such doubt in his favor and acquit him *(Davis* v. *U. S.*, 160 U. S. 469; *Ezzard* v. *U. S.*, 7 F. [2d] 808). Refused—Exceptions Allowed. Eugene Rice, Judge. Filed in open court January 10, 1950" (R. 98-100).

Instructions of the Court

The court instructed the jury, in part, as follows (R. 80):

"As to the second count of the indictment, you are instructed that the defendant has admitted making the sale charged in the second count of the indictment but contends that he is not guilty by reason of the fact that he was induced to make the sale as a result of entrapment. * * *

* * * * * * * *

"While it may be said that there is entrapment in each case, the result is that one is an illegal entrapment and bars a conviction, whereas, the other is a legal entrapment which does not bar a conviction, the distinction being that in one case the officers are justified in what they do—in the other they are not justified. *You should therefore consider the evidence offered by both the defendant and the government with the view of determining whether or not the officers of the government were justified in using the informer Brown to induce the defendant to commit the acts charged in the indictment,* provided, of course, that you find the defendant did commit the acts charged in the indictment, and *whether or not Brown merely afforded defendant an opportunity to commit a crime which he was ready and willing to commit or whether or not he lured the defendant by persuasion, continued insistance and representations to commit an offense in order that the government agents might arrest him and prosecute him therefor.*

* * * * * * * *

"You are therefore instructed that if you find from the evidence and beyond a reasonable doubt that the defendant had a reputation for selling narcotics and that the officers of the government had reasonable

grounds to believe that he was engaged in selling narcotics and in good faith sought to obtain evidence of such violations, you should convict the defendant as to each count of the indictment if you further find beyond a reasonable doubt that he made the sales as charged. On the other hand if you find from the evidence that the officers had no reasonable grounds to believe that the defendant was engaged in the sale of narcotics and were not acting in good faith to obtain evidence against one not already engaged in violations of the law but used an informer to induce the defendant to make a sale or sales in order to arrest him and prosecute him or if you entertain a reasonable doubt as to whether the officers so acted, your verdict should be not guilty. * * *" (Italics ours).

The defendant's counsel duly excepted to the instructions of the court (R. 85). The defendant's exceptions to the instructions of the court were stated as follows (R. 85):

"The defendant excepts to that part of the instructions of the court on the issue of entrapment, for the reason in the instruction as written it makes the question dependent entirely upon whether the government agents had reasonable cause to believe that this man was violating the law. Whereas the defendant claims the correct rule is not that but the gist of the question is whether he was induced to do something or commit a crime which would not otherwise have been committed. It is the defendant's understanding of the law that the officers might actually have reasonable cause to send a decoy to try to get evidence against a man but at the same time the officers might make an honest mistake, and that in such case the ultimate question to be determined would be whether or not the defendant was actually induced to commit a crime which would not otherwise have been committed and

which the defendant would not have committed if it hadn't been for such inducement and persuasion.

"And the defendant further excepts to the supplemental charge of the court on the question as to whether there was actually a sale or not. We think under the defendant's testimony it is the defendant's contention that there was not actually a sale but only the creation of a situation which might have appeared to be a sale."

Petitioner contends that the parts of the instructions of the court, above quoted, which are italicized, show what was apparently intended by the instructions of the court on the issue of entrapment. In the opinion of the Court of Appeals, the part of the instructions immediately following the statement:

"You should therefore consider the evidence offered by both the defendant and the government with the view of determining whether or not the officers of the government were justified in using the informer Brown to induce the defendant to commit the acts charged in the indictment,"

which said:

"Provided, of course, that you find the defendant did commit the acts charged in the indictment,"

is omitted.

Reading that clause in the instruction, as it was given by the court, it appears that what the trial court actually charged the jury was that it was immaterial whether or not Brown lured the defendant by persuasion, continued insistence and representations to commit an offense in

order that the government agents might arrest him and prosecute him therefor, if the officers of the government were justified in using the informer, Brown, to induce the defendant to commit the acts charged in the indictment, and that they were justified in doing so, if the defendant had a reputation for selling narcotics and the officers had reasonable grounds to believe that he was engaged in selling narcotics and in good faith sought to obtain evidence of such violations. The court made that clear in that part of the charge which said:

> "You are therefore instructed that if you find from the evidence and beyond a reasonable doubt that the defendant had a reputation for selling narcotics and that the officers of the government had reasonable grounds to believe that he was engaged in selling narcotics and in good faith sought to obtain evidence of such violations, you should convict the defendant as to each count of the indictment if you further find beyond a reasonable doubt that he made the sales as charged."

Furthermore, the opinion of the Court of Appeals does not, in quoting from the instructions of the trial court, quote that part of the instructions which immediately followed the last above quoted portion, wherein the jury was charged in effect that in order to acquit the defendant, on the ground of entrapment, it would be necessary that the jury find that the officers had no reasonable grounds to believe that the defendant was engaged in the sale of narcotics, and that certain other conditions existed conjunctively with that, and under which, the jury was not permitted to get down to the question as to whether Brown, by persistent persuasion, actually induced the de-

fendant to commit the acts alleged to constitute the offense, when the defendant would not otherwise have committed such an offense.

REASONS RELIED UPON FOR ISSUANCE OF WRIT

1. The questions involved are questions of Federal law which should be settled by this Court. The questions include the question as to what are proper instructions to be given to a jury in a case wherein entrapment is a defense, and the defendant was persuaded to do the act alleged to constitute the offense by a hired agent of officers of the government, and not by the officers themselves.

2. The decision of the United States Court of Appeals for the Tenth Circuit in this case is probably in conflict with applicable decisions of this Court, including the case of *Sorrells* v. *U. S.*, 287 U. S. 435, 77 L. Ed. 413, 53 Sup. Ct. 210, 86 A. L. R. 249.

3. The decision of the United States Court of Appeals for the Tenth Circuit in this case, in approving instructions in this case which did not make the hired agent of the officers who entrapped the defendant into committing the alleged offense (according to the defendant's evidence), the agent of the government, in consideration of the question of entrapment, is in conflict with decisions of the United States Court of Appeals for the Eight Circuit in the cases of *Butts* v. *U. S.* (C. C. A. 8), 273 Fed. 35, 18 A. L. R. 143, and *Meek* v. *U. S.* (C. C. A. 8), 16 Fed. (2d) 568, and of the United States Court of Appeals for the Ninth Circuit in the case of *Peterson* v. *U. S.* (C. C. A. 9), 255 Fed. 433, 166 C. C. A. 509, and of the United States

Court of Appeals for the Sixth Circuit in the case of *Cermak* v. *U. S.* (C. C. A. 6, 1925), 4 Fed. (2d) 99, (and the principles set forth in such cases were approved by this Court in the case of *Sorrells* v. *U. S.* [1932], 287 U. S. 435).

SPECIFICATIONS OF ERROR

1. The Court of Appeals erred in holding that the District Court did not err in instructing the jury on the issue of entrapment.

2. The Court of Appeals erred in not holding that the District Court committed reversible error in instructing the jury on the issue of entrapment.

3. The Court of Appeals erred in not holding that the District Court committed reversible error in giving controlling importance in instructions on the issue of entrapment to the question as to whether the petitioner had a reputation for selling narcotics and whether the officers of the government had reasonable grounds to believe that petitioner was engaged in selling narcotics.

4. The Court of Appeals erred in not holding that the District Court erred in refusing to give to the jury the defendant's Requested Instruction numbered One.

5. The Court of Appeals erred in not holding that the District Court erred in refusing to give to the jury the defendant's Requested Instruction numbered Two.

6. The Court of Appeals erred in not holding that the District Court erred in refusing to give to the jury the defendant's Requested Instruction numbered Three.

7. The Court of Appeals erred in not holding that the District Court erred in refusing to give to the jury the defendant's Requested Instructions numbered 1 to 5, inclusive, and each of them.

8. The Court of Appeals erred in not reversing the judgment of the District Court with directions to grant petitioner, the defendant in the District Court, a new trial, or to dismiss the case.

Wherefore, petitioner respectfully prays that a writ of certiorari issue out of this Court directed to the United States Court of Appeals for the Tenth Circuit, requiring that said court send to this Court a complete transcript of the record in that court in case No. 4069 therein, entitled, "Oliver Cleve Ryles, Appellant, v. United States of America, Appellee," and that the decision and judgment of said Court of Appeals be reviewed by this Honorable Court, and that the judgment of said Court of Appeals be reversed, and for such other and further relief as this Court may deem proper.

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UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals for the Tenth Circuit in this case has not been reported but is included in the record and a copy of the same is attached to the petition for writ of certiorari and this brief in support thereof as an appendix. There was no opinion written by the District Court.

II.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and Rule 37(b)(2) of the Federal Rules of

Criminal Procedure. The judgment of the Court of Appeals was entered on August 22, 1950.

III.

STATEMENT OF THE CASE

Reference is made to the statement of the case contained in the petition for writ of certiorari filed herewith. As to the questions presented and reasons relied on for issuance of a writ of certiorari, reference is also made to the statement of same in the petition for writ of certiorari filed herewith.

IV.

SPECIFICATIONS OF ERROR

1. The Court of Appeals erred in holding that the District Court did not err in instructing the jury on the issue of entrapment.

2. The Court of Appeals erred in not holding that the District Court committed reversible error in instructing the jury on the issue of entrapment.

3. The Court of Appeals erred in not holding that the District Court committed reversible error in giving controlling importance in instructions on the issue of entrapment to the question as to whether the petitioner had a reputation for selling narcotics and whether the officers of the government had reasonable grounds to believe that petitioner was engaged in selling narcotics.

4. The Court of Appeals erred in not holding that

the District Court erred in refusing to give to the jury the defendant's Requested Instruction numbered One.

5. The Court of Appeals erred in not holding that the District Court erred in refusing to give to the jury the defendant's Requested Instruction numbered Two.

6. The Court of Appeals erred in not holding that the District Court erred in refusing to give to the jury the defendant's Requested Instruction numbered Three.

7. The Court of Appeals erred in not holding that the District Court erred in refusing to give to the jury the defendant's Requested Instructions numbered 1 to 5, inclusive, and each of them.

8. The Court of Appeals erred in not reversing the judgment of the District Court with directions to grant petitioner, the defendant in the District Court, a new trial, or to dismiss the case.

V.

ARGUMENT

First Proposition

The Court of Appeals erred in not holding that the District Court erred in instructing the jury on the issue of entrapment.

This proposition combines Specifications of Error Numbered 1, 2 and 3.

As is shown in the petition for writ of certiorari, petitioner contends that the instructions which the trial court gave entirely missed the determining point as to whether

there was entrapment in this case. The trial court, in effect, instructed the jury that the defense of entrapment was not available to the defendant, whether or not he was lured into commission of the acts alleged to constitute either offense, by the witness, Brown, by continued insistence and persuasion, if the officers of the government had reasonable grounds to believe that the defendant was engaged in selling narcotics and in good faith sought to obtain evidence of such violations (R. 81). To determine the law governing the defense of entrapment in such a case as this in the Federal Courts, it is necessary to refer to the case of *Sorrells* v. *U. S.*, 287 U. S. 435, 77 L. Ed. 413, 53 Sup. Ct. 210, 86 A. L. R. 249. In the majority opinion in that case, by MR. CHIEF JUSTICE HUGHES, the controlling question, in determining whether entrapment exists, was defined as follows:

> "The predisposition and criminal design of the defendant are relevant. *But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials.* If that is the fact, common justice requires that the accused be permitted to prove it" (Italics ours).

The instructions which the court gave made the controlling question not whether the accused was induced by the activity and persuasion of the government agents to commit the acts alleged to constitute the offenses charged, when he would not have otherwise been guilty of such an offense (selling narcotics), but whether the govern-

ment narcotic agents (and Brown was not classed as one of them in the instructions) had reasonable grounds to believe that the defendant was engaged in selling narcotics. The thing which the instructions made the controlling question to determine the issue was not (petitioner contends), the controlling question, but only an evidentiary matter by which determination of the controlling question might have been assisted.

In the case of *Peterson* v. *U. S.* (C. C. A. 9, 1919), 255 Fed. 433, 166 C. C. A. 509, the trial court made the same error in instructing the jury, and the judgment was reversed therefor.

The opinion of the Court of Appeals in this case states that the defendant "took exception to that portion of the instructions which advised the jury that the government agents had the right to use informers or decoys to make the purchases if they had reasonable grounds to believe that the defendant was engaged in the unlawful sale of narcotics." This was not an accurate statement of the ground of the defendant's exceptions to the instructions of the court, which are set forth in the petition for writ of certiorari. Surely, the government agents have the right to use informers or decoys in such a case, but that does not determine the ultimate question as to whether there is entrapment in the case, which depends upon whether the accused was induced to commit an offense by a government agent, which he would not have committed, if it had not been for the activity of the government agent, and where, if it had not been for the persuasion of the government agent causing the accused to commit the offense, the

accused never would have committed such an offense. We believe that is what this Court meant by the above quoted language in the opinion in the case of *Sorrells* v. *U. S., supra,* for in the majority opinion in that case this Court approved similar statements as to the elements of the defense of entrapment which had been made in the opinion of the Court of Appeals for the Eighth Circuit in the case of *Butts* v. *United States,* 273 Fed. 38, 18 A. L. R. 143, and in the opinion of the Court of Appeals for the Fourth Circuit in the case of *Newman* v. *United States,* 299 Fed. 131. We do not deny that the predisposition and criminal design of the defendant are relevant in determining whether there has been entrapment, but say that the question as to whether government narcotic bureau agents had reasonable grounds to believe that the defendant was engaged in the sale of narcotics (where the alleged sale of narcotics was induced by a hired agent of such government narcotic bureau officers), is not the controlling question in determining whether there was entrapment, and the opinion of the Court of Appeals in this case erroneously assumes, we assert, in the next to the last paragraph of such opinion, that that is the controlling question.

Second Proposition

The Court of Appeals erred in not holding that the District Court erred in refusing to give to the jury the defendant's Requested Instructions numbered 1 to 5, inclusive, and each of them.

This proposition combines Specifications of Error numbered 4, 5, 6 and 7.

The defendant's requested instructions are set forth in the petition for writ of certiorari.

We submit that each of the defendant's requested instructions was correct and the propositions stated therein had been approved in the cases cited underneath such requested instructions, and submitted with them, and in some of such cases, judgments were reversed for failure to give similar instructions in similar types of cases, involving entrapment.

In the case of *DiSalvo* v. *U. S.*, 2 Fed. (2d) 222, the Circuit Court of Appeals for the Eighth Circuit reversed a conviction because of the refusal of the trial court to give an instruction requested by the defendant, in a case wherein entrapment was a defense, and such requested instruction was exactly the same as the defendant's Requested Instruction numbered One in this case.

The defendant's version of the facts in this case is exactly like the facts which the defendant claimed existed in the case of *Butts* v. *U. S.*, 273 Fed. 35, 18 A. L. R. 143, *supra*. In that case, the informer who was acting for the narcotic bureau agents was, in the opinion of the Circuit Court of Appeals for the Eighth Circuit, the *agent* of the officers, and so, the agent of the Government, and the narcotic bureau officers were bound by his acts, in overpersuading the defendant to go get him some morphine, as if they, themselves, had done the persuading personally. That is apparent from the following quotation from that opinion:

> "The defendant had never committed any such offense as the officers of the government arrested and

> prosecuted him for, prior to the time when they induced him to do the acts disclosed by this testimony. There is no evidence that he had ever contemplated, much less intended, to sell any morphine. He had never done so,—he had none to sell. The officers, *through their agent,* Rudolph, incited, lured, and persuaded him by false representations to go to a third person and get the morphine for his acquaintance, *the officer's agent,* and to consent either to sell it or to act as the agent of the party from whom he received it in the sale the officers betrayed him into."

Under the case of *Cermak* v. *U. S.* (C. C. A. 6, 1925), 4 Fed. (2d) 99, the addict informer, Brown, in this case, was the government's agent, and as was said in that case, "the government must take the responsibility for the addict's success in bringing about that criminal intent which would not otherwise have arisen."

The opinion of the Court of Appeals for the Tenth Circuit in this case is in conflict with the opinion of the Court of Appeals for the Sixth Circuit in that case, in not making the government responsible for informer, Brown's, success in overpersuading the defendant to attempt to procure for him some morphine.

So, petitioner contends that the Court of Appeals erred in not holding that the District Court erred in refusing to give to the jury the defendant's Requested Instruction numbered Two, that informer, Brown, was an agent of the government in the matter.

Petitioner cannot agree with the statement in the opinion of the Court of Appeals that the defendant's offered instructions were fully covered by the court. The instruc-

tions of the court in this case appear to be based upon the assumption that the government was not responsible in any way for what Brown did, if the officers who employed Brown had reasonable grounds to believe that the defendant was engaged in the sale of narcotics, and it appears that the opinion of the Court of Appeals for the Tenth Circuit in this case approves that principle.

The principles stated in defendant's Requested Instruction numbered Three had been approved by the Court of Appeals for the First Circuit in the case of *Capuano* v. *U. S.* (C. C. A. 1, 1925), 9 Fed. (2d) 41. It is contended by the petitioner that the Court of Appeals was in error in this case in holding that the principles of law included in the defendant's Requested Instructions numbered 1 to 4, inclusive, and each of them, were properly covered by and included in the instructions of the trial court to the jury in this case.

Third Proposition

The Court of Appeals erred in not reversing the judgment of the District Court with directions to grant petitioner, the defendant in the District Court, a new trial, or to dismiss the case.

This, of course, follows, from the foregoing.

CONCLUSION

It is respectfully submitted that the questions involved in this case are such as to justify this Court in granting a writ of certiorari to the United States Court of

Appeals for the Tenth Circuit, in order that its opinion and decision may be reviewed, and that this Court should review the decision of the Court of Appeals for the Tenth Circuit in this case and reverse it.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 4069—May Term, 1950

FILED

United States Court of Appeals
Tenth Circuit

Aug. 22, 1950

Robert B. Cartwright
Clerk

Oliver Cleve Ryles,
Appellant,
v.
United States of America,
Appellee.

Appeal from the United States District Court for the Eastern District of Oklahoma.

Carloss Wadlington (Turner M. King was with him on the brief), for appellant.

Paul Gotcher, Assistant United States Attorney (Cleon A. Summers, United States Attorney, was with him on the brief), for appellee.

Before PHILLIPS, Chief Judge, and MURRAH and PICKETT, Circuit Judges.

PICKETT, Circuit Judge.

The defendant was previously tried and convicted upon an indictment charging illegal sales of narcotics in violation of 26 U. S. C. A. 2554 (a). On appeal the defendant con-

tended that the defense of entrapment should have been submitted to the jury. This court held against the defendant upon the ground that no instruction on the law of entrapment had been requested. *Ryles* v. *U. S.*, 172 F. 2d 72. The Supreme Court of the United States, at the suggestion of the Solicitor General, reversed and remanded the case for a new trial. *Ryles* v. *U. S.*, 336 U. S. 949. On the second trial, the defendant admitted the transaction charged in the second count of the indictment and interposed a defense of entrapment. The jury found the defendant guilty on the second count and he was sentenced to serve a term of three years. The defendant complains of the court's refusal to give certain offered instructions dealing with entrapment and the burden of proof, and he took exception to that portion of the instructions which advised the jury that the government agents had the right to use informers or decoys to make the purchases if they had reasonable grounds to believe that the defendant was engaged in the unlawful sale of narcotics.

It is not necessary to set forth the facts in detail. The defendant was an addict, had a criminal record for violation of the narcotic laws, was suspected by government agents and local police and had a reputation as a dealer in narcotics. The government used known addicts who made the purchases set forth in the indictment. They represented to the defendant that they were suffering from a lack of narcotics. As to the right of the government to obtain evidence in this manner, the rule was announced by this court on the former appeal to be: "a government agent may use 'decoys' in apprehending law violators, and may offer an opportunity to one who is intending or willing to commit a crime. But, the law will not countenance decoys for the purpose of luring or inducing the innocent or law-abiding into the commission of crime." *Sorrells* v. *U. S.*, 287 U. S. 435, 441. In *Heath* v. *U. S.*, 10 Cir., 169 F. 2d 1007, 1010, it was said: "It is well recognized that officers may entrap one into the commission of an offense

only when they have reasonable grounds to believe that he is engaged in unlawful activities. They may not initiate the intent and purpose of the violation. In a case of entrapment, it is incumbent on the government to prove reasonable grounds to believe that the intent and purpose to violate the law existed in the mind of the accused." *Mitchell* v. *U. S.*, 10 Cir., 143 F. 2d 953, 957.

When the defense of entrapment is interposed, the predisposition and criminal design of the defendant becomes relevant and the government may introduce evidence relating to the conduct and the predisposition of the defendant as it bears upon the issue of entrapment. The record and the reputation of the defendant become important upon this issue in rebuttal. *Sorrells* v. *U. S.*, *supra,* page 451. The evidence here presented an issue of entrapment to be presented to a jury with proper instructions. *Sorrells* v. *U. S.*, *supra; Yep* v. *U. S.*, 10 Cir., 83 F. 2d 41; *Strader* v. *U. S.*, 10 Cir., 72 F. 2d 589. The offered instructions were not given in the exact language as submitted but the requests were fully covered by the court. The jury was instructed: "that entrapment as that term is used in these instructions exists only when government agents induce and originate the criminal intent of the defendant, and there is no entrapment where criminal intent is already present and the government agents merely afford the opportunity for commission of the crime. If an officer of the law had reason to believe that a law is being violated, he may proceed to ascertain whether those who are thought to be doing so are actually violating the law. The officers of the government, however, must act in good faith and in the honest belief that the defendant is engaged in the unlawful business of which the offense charged in the indictment is a part, and the purpose of entrapment must be not to induce an innocent man to commit a crime but to secure evidence upon which a guilty man can be brought to justice. * * * You should therefore consider the evidence offered by both the defendant and the government

with the view of determining whether or not the officers of the government were justified in using the informer Brown to induce the defendant to commit the acts charged in the indictment * * * and whether or not Brown merely afforded defendant an opportunity to commit a crime which he was ready and willing to commit or whether or not he lured the defendant by persuasion, continued insistence and representations to commit an offense in order that the government agents might arrest him and prosecute him therefor." The court further instructed the jury that "the burden is upon the government to prove by competent evidence to the satisfaction of the jury beyond a reasonable doubt that it was not entrapment. You are therefore instructed that if you find from the evidence and beyond a reasonable doubt that the defendant had a reputation for selling narcotics and that the officers of the government had reasonable grounds to believe he was engaged in selling narcotics and in good faith sought to obtain evidence of such violations, you should convict the defendant as to each count of the indictment if you further find beyond a reasonable doubt that he made the sales as charged." The court's instructions in substance state the law of entrapment and the burden of proof required of the prosecution.

It fully and fairly submitted to the jury the issue of whether the government agents had reasonable grounds to believe that the defendant was engaged in the sale of narcotics which would justify them in using the means which they did to secure the evidence.

Finding no error in the proceedings the judgment is AFFIRMED.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 317

OLIVER CLEVE RYLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 103-106) is reported at 183 F. 2d 944.

JURISDICTION

The judgment of the Court of Appeals was entered on August 22, 1950 (R. 106). The petition for a writ of certiorari was filed September 19, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether in the prosecution of petitioner for the illegal sale of narcotics the court's charge was

erroneous as not properly presenting his defense of illegal entrapment.

STATUTE INVOLVED

26 U.S.C. [1946 ed.] 2554(a), (Act of December 17, 1914, Sec. 2, 38 Stat. 786, as amended, 44 Stat. 1023, 1382) provides:

> It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

STATEMENT

Petitioner was charged with violation of 26 U.S.C. [1946 ed.] 2554(a) in an indictment, under count 1 with unlawful sale of opium, and under count 2 with the unlawful sale of morphine to one Brown, not in pursuance of a written order form prescribed by the Collector of Internal Revenue and not within any of the exceptions provided by law (R. 1-2).[1] The evidence at his trial may be summarized briefly as follows:

After United States narcotic agents learned of petitioner's reputation for engaging in the sale of

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[1] On appeal from petitioner's conviction on a previous trial for the same offenses, he contended that the defense of entrapment should have been submitted to the jury, but the Court of Appeals affirmed upon the ground that no instruction on the law of entrapment had been requested (*Ryles* v. *United States*, 172 F. 2d 72). This Court, at the suggestion of the Solicitor General, granted certiorari and reversed and remanded the case for a new trial (336 U. S. 949).

narcotics at Ada, Oklahoma (R. 25, 26, 48, 50-52),[2] they arranged with the state authorities for the release upon his own recognizance from the jail at Tulsa of one Brown, a drug addict, who was being held on a pending robbery charge for stealing drugs from a doctor.[3] Brown was released so that he might go to Ada to assist in the apprehension of petitioner. (R. 27, 43, 53, 91-94.) A narcotic agent drove Brown and another addict, Wanda Roumaine, who posed as Brown's wife, to Ada, where Brown's expenses of five dollars per day were paid by the Government (R. 12, 13, 23, 27, 32-33). Upon being apprised by Brown of his and his wife's need for drugs to relieve their pain, petitioner on August 18, 1947, sold to Brown for seven dollars a quantity of opium in a bottle [count 1] (R. 9-10, 27-28, 37-38, 55). On August 20, 1947, petitioner sold to Brown for nine dollars four one-quarter grain tablets of morphine sulphate [count 2] (R. 10, 18-21, 29-30, 47-48, 55).[4] In each instance Brown was not furnished with a blank order form

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[2] On September 4, 1944, in the United States District Court for the Eastern District of Oklahoma, petitioner was given two-year sentences on each of three counts, to run concurrently, for illegally altering prescriptions for morphine (R. 55, 65, 67, 89-91). He had also been given a seven-year sentence and was later pardoned on a state court charge of robbery at Ada in 1932 or 1933 (R. 66, 67).

[3] Brown was later convicted on this robbery charge (R. 30, 43, 44, 94-97). He had also been convicted of a narcotic act violation (R. 30).

[4] Petitioner testified, denying the sale embodied in count 1, but admitting delivery of morphine tablets to Brown [count 2] (R. 59-62).

prescribed by the Collector of Internal Revenue; was searched by the narcotic agent for narcotics before making the purchase; was given money by the agent to make the purchase; and returned to the agent the drugs purchased after he had observed the transaction (R. 9-10, 11, 30, 64).

At both the close of the government's evidence and all of the evidence, petitioner's motions for judgment of acquittal by reason of wrongful entrapment were overruled (R. 57, 75). The jury having found petitioner not guilty under count 1 but guilty under count 2, he was sentenced to three years' imprisonment (R. 2, 4-5). The Court of Appeals affirmed the conviction (R. 106-107).

ARGUMENT

1. Petitioner, in asserting that the Court of Appeals' opinion upholding the trial court's instructions is in conflict with *Sorrells* v. *United States*, 287 U. S. 435, contends that the instructions were erroneous because they made the controlling question whether the government agents had reasonable grounds to believe that he was engaged in selling narcotics, instead of whether he was lured into the sale by the activity and persuasion of the informer (Pet. 14, 20-22). There is no merit in this contention since when read as a whole, the charge properly stated the elements of the defense of entrapment.

The Government, as even the petitioner admits (see Pet. 21), had a right to use Brown as an informer or decoy to afford petitioner, a known nar-

cotics peddler, the opportunity of committing an offense. Cf. *Sorrells* v. *United States, supra,* 287 U. S. at 441, 445; *United States* v. *Roett,* 172 F. 2d 379, 381 (C.A. 3), certiorari denied, 336 U. S. 960; *Weathers* v. *United States,* 126 F. 2d 118, 119 (C.A. 5), certiorari denied, 316 U. S. 681. Having sought "acquittal by reason of entrapment," the petitioner's "predisposition and criminal design" were relevant, and he could not complain of "an appropriate and searching inquiry into his own conduct and predisposition." *Sorrells* v. *United States, supra,* 287 U. S. at 451. In establishing the lawfulness of its activities, it was "incumbent on the government to prove reasonable grounds to believe that the intent and purpose to violate the law existed in the mind of the [petitioner]." *Heath* v. *United States,* 169 F. 2d 1007, 1010 (C.A. 10). Cf. *Mitchell* v. *United States,* 143 F. 2d 953, 957 (C.A. 10). On the trial the prosecution did introduce such proof. Two narcotic agents had been informed by several drug addicts that petitioner was "selling narcotic drugs" and "handling narcotics in the City of Ada" (R. 25, 26, 51-52). Also, the Chief of Police and a police officer at Ada testified that petitioner had a reputation in the community for being a "dope addict" and "handling narcotics" (R. 48, 50). Further, although there was no evidence that petitioner had previously been convicted for the illegal sale of drugs, he had served a sentence for a related offense of

unlawful alteration of certain prescriptions for morphine (see fn. 2, *supra*). Cf. *United States* v. *Becker*, 62 F. 2d 1007, 1008-1009 (C.A. 2). The petitioner's claim that the charge was improper is largely based on particular sentences taken out of context. The charge must be read in its entirety if the instructions are to be understood. On the issue of entrapment the court stated (R. 80-81):

> As to the second count of the indictment, you are instructed that the defendant has admitted making the sale charged in the second count of the indictment but contends that he is not guilty by reason of the fact that he was induced to make the sale as a result of entrapment. As to the second count of the indictment, you are instructed that if you find from the evidence and beyond a reasonable doubt that the sale mentioned therein was not the result of entrapment by the government officers, your verdict should be guilty. On the other hand if you find that it was the result of entrapment or if you entertain a reasonable doubt as to whether it was the result of entrapment, your verdict should be not guilty.
>
> You are instructed that entrapment as that term is used in these instructions exists only when government agents induce and originate the criminal intent of the defendant, and there is no entrapment where criminal intent is already present and the government agents merely afford the opportunity for commission of the crime. If an officer of the law has reason to believe that a law is being violated, he

may proceed to ascertain whether those who are thought to be doing so are actually violating the law. The officers of the government, however, must act in good faith and in the honest belief that the defendant is engaged in the unlawful business of which the offense charged in the indictment is a part, and the purpose of entrapment must be not to induce an innocent man to commit crime but to secure evidence upon which a guilty man can be brought to justice. While it may be said that there is entrapment in each case, the result is that one is an illegal entrapment and bars a conviction, whereas the other is a legal entrapment which does not bar a conviction, the distinction being that in one case the officers are justified in what they do—in the other they are not justified. You should therefore consider the evidence offered by both the defendant and the government with the view of determining whether or not the officers of the government were justified in using the informer Brown to induce the defendant to commit the acts charged in the indictment provided, of course, that you find the defendant did commit the acts charged in the indictment, and whether or not Brown merely afforded defendant an opportunity to commit a crime which he was ready and willing to commit or whether or not he lured the defendant by persuasion, continued insistence and representations to commit an offense in order that the government agents might arrest him and prosecute him therefor.

You are instructed that when the evidence is sufficient to raise the issue of entrapment, the

> burden is upon the government to prove by competent evidence to the satisfaction of the jury beyond a reasonable doubt that it was not entrapment. You are therefore instructed that if you find from the evidence and beyond a reasonable doubt that the defendant had a reputation for selling narcotics and that the officers of the government had reasonable grounds to believe that he was engaged in selling narcotics and in good faith sought to obtain evidence of such violations, you should convict the defendant as to each count of the indictment if you further find beyond a reasonable doubt that he made the sales as charged. On the other hand if you find from the evidence that the officers had no reasonable grounds to believe that the defendant was engaged in the sale of narcotics and were not acting in good faith to obtain evidence against one not already engaged in violations of the law but used an informer to induce the defendant to make a sale or sales in order to arrest him and prosecute him or if you entertain a reasonable doubt as to whether the officers so acted, your verdict should be not guilty.

In addition, when the court charged the jury with respect to the issue of whether the actions of the government agents prevented a "sale" from taking place, he stated further (R. 82):

> * * * In other words, the officers of the government can't go out and find someone whom they select to make a case on and induce him to commit an act that he never intended to

> do, or have anything to do with, and after he does that then turn around and prosecute him. The government says, we just don't permit that to be done. I think that is the correct view of entrapment rather than try to say that what the man did isn't a violation of the law. The government says, even though it has the appearance of being a violation of law and does come within the purview of the act, we will not permit the prosecution; it is contrary to the policy of the government to permit the prosecution. So I say to you that if you find there was entrapment it makes no difference whether you treat it as a sale or as not a sale because he is not guilty. On the other hand if the elements of entrapment as I have tried to explain to you are sufficient to be allowed and you think that the officers merely afforded this man an opportunity to commit this offense and he delivered the narcotics under the circumstances outlined here it is a sale. * * *

When read as a whole the charge appears substantially the same as that which was upheld in *Newman* v. *United States*, 299 Fed. 128, 132 (C.A. 4). We submit that the charge was in proper form and, as we have pointed out above (see p. 5, *supra*), there was ample evidence that the narcotics agents had reasonable ground to believe that petitioner was engaged in the illegal sale of drugs to warrant an incorporation of that element in the charge.[5]

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[5]Petitioner cites *Peterson* v. *United States*, 255 Fed. 433 (C. A. 9) as authority that the trial court erred in instructing

2. Neither is there any substance in petitioner's contention that the trial court erred in refusing to give his requested instructions No. 1 through 5 [R. 98-100] (Pet. 22-25). The court's charge adequately covered all the various aspects of the case, and the refusal to give the petitioner's requested instructions, when the substance of them was included in the charge as given, was not error. Cf. *United States* v. *Trenton Potteries,* 273 U. S. 392, 396.

Petitioner's requested instructions Nos. 1, 3 and 4 all deal with the definition of, and the general law as to entrapment, and their substance was included in the court's charge (see R. 80-81). As to requested instruction No. 2, although the charge did not refer to Brown as a government agent, it did designate him as an informer (R. 81, 82, 83),[6] there being no substantial difference in the two terms in the application of the doctrine of entrapment.[7] As to requested instruction No. 5, the charge contained a clear general burden of proof

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the jury on entrapment (Pet. 21). However, there the trial court had taken away from the jury the defense of entrapment, and the appellate court granted a new trial because that issue should have been submitted to the jury as a controverted question of fact. 255 Fed. at 436-437. In the instant case, however, the entrapment issue was properly submitted to the jury.

[6] The charge, in part, read:

"You should therefore consider * * * whether or not the officers of the government were justified in using the informer Brown to induce the [petitioner] to commit the acts charged in the indictment * * *" (R. 80-81).

[7] Neither *Butts* v. *United States,* 273 Fed. 35 (C.A. 8), nor *Cermak* v. *United States,* 4 F. 2d 99 (C.A. 6) (see Pet. 23-24),

instruction [8] and another such instruction on the issue of entrapment.[9]

CONCLUSION

There is no conflict in the decisions and no question warranting further review by this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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IRVING S. SHAPIRO,
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OCTOBER 1950.

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holds that the government decoy used must be referred to in the entrapment instruction as an "agent" and cannot be called an "informer."

[8] "The burden is upon the government to prove the material allegations in each count of the indictment, and before you would be warranted in finding a verdict of guilty, the evidence must be such as convinces you of the guilt of the [petitioner] beyond a reasonable doubt" (R. 78-79).

[9] "You are instructed that when the evidence is sufficient to raise the issue of entrapment, the burden is upon the government to prove by competent evidence to the satisfaction of the jury beyond a reasonable doubt that it was not entrapment" (R. 81).

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